

Congress Right to Demand Explanation from President

By Zoe Lofgren

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On Dec. 16, I learned from media accounts that the National Security Agency has been spying on American citizens and legal residents seemingly in violation of U.S. law. This surprised me, and most of my colleagues in Congress. What little we've been told by the Bush administration since the 16th about the claimed legal basis for this domestic spying is troubling.

President Bush secretly ordered the NSA to spy on Americans without a court order as early as October 2001. Since then, it is reported that the NSA has monitored the communications of possibly thousands of American citizens and legal residents (termed "U.S. persons" under the law). Current reports suggest that some purely domestic communications may have been the subject of wiretaps. The president has admitted to reauthorizing this program more than 30 times and says he has no plans to stop.

National security electronic surveillance of Americans is regulated under the Foreign Intelligence Surveillance Act, or FISA. This 1978 law requires warrants for surveillance of U.S. persons. Congress created a special court that meets in secret to approve requests for warrants, so that law enforcement and intelligence services could guard our nation, while preserving our constitutional rights. Outside of this process, national security electronic surveillance of U.S. persons is a felony, punishable with imprisonment.

As to why he acted as he did, the president has said it's because this is "a different era" and "a different war," due to the speed with which terrorists can change phone numbers and phone calls.

This is, indeed, a different era. But FISA already has safeguards to allow law enforcement and intelligence services to remain agile while pursuing threats in the 21st century. Judges can provide warrants in hours, sometimes in minutes. In urgent situations, FISA allows wiretaps without a warrant for 72 hours, with warrants obtained after the fact. The Patriot Act allows warrants to "follow the person" instead of the phone number through "roving wiretaps." Since the law's inception 27 years ago, the FISA court has received more than 18,000 warrant requests and turned down only five.

Despite these provisions and without explaining why, the president says law enforcement and intelligence officers need to act without warrants. Neither the president nor his administration have come before Congress in the past four years to argue that FISA's warrant requirements were not enough to keep Americans safe or to ask us in Congress to make changes.

It appears that the NSA violated the law at the president's direction. Of great concern is the legal authority claimed by President Bush for the warrantless spying he ordered. These claims of legal authority are very shaky. He asserted, in his national radio address, that the president has authority to act outside of the FISA law because Congress authorized the use of force against terrorists in Afghanistan and because of the "inherent authority" of the commander in chief.

I was there in Congress on Sept. 14, 2001, when the authorization for the use of force against terrorists was adopted. I voted for it. Nothing in the resolution exempts the president from compliance with the FISA law.

The president's claim of inherent authority as commander in chief to ignore the law is a radical departure from our American system of government.

As a young congressional staffer, I looked on when President Nixon asserted similar claims about the inherent authority of the president. In 1972, the Supreme Court unanimously said "no" to Nixon's sweeping claim of presidential power. In

1978, Congress passed the FISA law to make sure that surveillance activities were overseen by the courts, carried out within the law, so that abuses would not be committed again. Is the president really asserting that the laws passed by Congress or the constitutional rulings of the Supreme Court don't apply to him? What then of the system of checks and balances instituted by the forefathers in our Constitution that President Bush took an oath to protect and defend?

This is serious business. Congress and the American people deserve serious answers, not offhand comments at news conferences or the ``talking points" now being spun out of the Republican National Committee. This week, with 38 other members of Congress, I wrote to the inspectors general of the Department of Justice and the Department of Defense as well as to the Government Accountability Office, asking them to investigate whether the FISA laws have been obeyed and requesting that they report back to Congress in January on their results. My colleague, Rep. Rick Boucher, D-Va., and I, along with 15 other members of the Judiciary Committee, have asked the committee chairman, Rep. James Sensenbrenner, R-Wis., for Judiciary Committee hearings on these presidential activities immediately.

Not all the facts are in, but they rarely are. It is imperative that we fully understand exactly what the president ordered and whether there was a legal basis for his actions.

Our government must be one of laws and not of the will or desires of particular individuals, no matter how powerful those individuals may be. The president must lead in the observance of this principle. Congress and the public must know whether the rule of law has been observed in this case. As a first step, the nation must know whether the president has followed the law, or whether he considers himself above it.

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